SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

—against—

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Interest of *Amici*

The American Civil Liberties Union and its New York affiliate, the New York Civil Liberties Union, are committed to the protection of constitutional rights and individual liberties safeguarded by the Bill of Rights. In particular, we have acted to insure that the full measure of due process of law, the privilege against self-incrimination, and the right to counsel are afforded to all criminally accused, regardless of their status in society. In furtherance of these goals, *amici* have traditionally defended the rights of

citizens of every persuasion in the courts, the legislatures, and the executive departments of government.*

Statement of Question Presented

The question presented is whether a state prisoner is entitled to an evidentiary hearing where his habeas corpus petition alleges substantial facts, without contradiction by the state, demonstrating that he was convicted upon an involuntary plea of guilty induced by the existence and threatened use of a coerced confession.

Statement of the Case

The four Respondents in these cases all filed petitions for habeas corpus in three different district courts of the Second Circuit, alleging, *inter alia*, that their pleas of guilty in New York State prosecutions had been unconstitutionally coerced by the existence and threatened use of coerced confessions. None of the respondents was afforded an evidentiary hearing on the claims either in the state courts or the District Courts.[1] Each of these cases, of course, presents its own particular set of facts, but the main issue before the Court can best be understood by a brief outline of one of the cases, that of Foster Dash.

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* The attorneys for the parties have consented to the filing of this brief. The letters of consent are on file with the Clerk.

[1] While the petition for certiorari was pending, Wilbert Ross died, and accordingly by order of this Court, dated December 8, 1969, the judgment of the Court of Appeals was vacated, and the case was remanded with directions that it be dismissed as moot.

In his application for habeas corpus to the United States District Court for the Southern District of New York, Dash alleged:

(1) On February 26, 1959, he was arrested, taken to a police station in New York City and intensively interrogated by a group of officers about the commission of various crimes, including a robbery for which he had been indicted; his repeated requests for counsel were denied, and he was not advised of his right to remain silent; he was beaten by police officers and kept incommunicado for almost eight hours; finally he was threatened by an assistant district attorney that every unsolved crime would be charged to him if he did not confess (A. 24-25). Despite consistently maintaining his innocence, he finally was coerced into signing a confession (A. 25).[2]

(2) Approximately one month later, Dash pleaded guilty to second degree robbery (A. 26). He had previously been advised by his court-appointed counsel that nothing could be done about the confession and that because of the confession, Dash should plead guilty (A. 25-26). Dash had also previously been admonished by the trial judge that if he went to trial, he would get the maximum sentence for a crime which the judge regarded as nearly as bad as murder (A. 26).

(3) Dash was then sentenced to a term of 8 to 12 years as a second felony offender (A. 23). No appeal

[2] The conviction of two of Dash's co-defendants who went to trial was set aside because their confessions were held to have been coerced. *People* v. *Waterman*, 12 A.D.2d 84, 208 N.Y.S.2d 596 (1st Dep't 1960), *aff'd*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).

was taken from the judgment of conviction (A. 23). Later, his state petition for a writ of error *coram nobis* on the ground that his guilty plea was induced by a coerced confession was denied without a hearing and the decision was affirmed by the Appellate Division, and the New York Court of Appeals. *People* v. *Dash*, 21 A.D.2d 978 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 493, 208 N.E.2d 171, 260 N.Y.S.2d 437 (1965) (A. 23, 33).

The District Court for the Southern District of New York dismissed the petition, without holding a hearing, on the ground that a "voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of the proceedings against the defendant" (A. 37).

The Court of Appeals for the Second Circuit reversed the dismissal of the petition and remanded the case to the District Court with instructions to hear and determine Dash's application, unless the state courts afforded him a hearing to determine whether his plea was voluntary. In an *in banc* decision representing the views of six Judges, the Court held that an alleged coerced confession may be a relevant factor in the determination of the voluntariness of a guilty plea and that the standards of *Townsend* v. *Sain*, 372 U.S. 293 (1963), apply in determining whether or not to hold an evidentiary hearing with respect to a claim that a plea was not voluntary because it was induced by the existence, or threatened use of, an allegedly coerced confession. The Court then went on to hold that Dash's allegations raised a sufficient question as to the voluntariness of the plea of guilty to require a hearing before the issue is determined (A. 125). In so holding, the Court noted the only means by which Dash could have challenged the

validity of the confession under New York law was the procedure already held by this Court to be retroactively unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964). This fact posed a dilemma for Dash, for as the Court of Appeals noted,

> The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest (A. 125).

The Court of Appeals emphasized that its decision was limited to Dash's particularized allegations as to how his coerced confession induced his plea and indicated that the conviction would of course stand if, after a full and fair evidentiary hearing, the confession was found to be voluntary.

ARGUMENT

A state prisoner is entitled to an evidentiary hearing where his habeas corpus petition alleges substantial facts demonstrating that his guilty plea was involuntarily induced by the existence and threatened use of a coerced confession.

This Court has clearly and consistently held that an involuntary or coerced plea of guilty is inconsistent with due process of law and thus invalid. In so holding, this Court has focused upon the particularized allegations at issue and has not attempted to catalogue the other ways in which a plea can be unconstitutionally coerced. *Boykin* v. *Alabama,* 395 U.S. 238 (1969) (failure of record to show that plea was intelligent and voluntary); *Machibroda* v. *United States,* 368 U.S. 487 (1962) (promises of leniency and threats of reprisal by prosecutor); *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956) (threats by prosecutor to physical safety of defendant and his family and failure to advise as to nature and consequences of plea); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948) (deprivation of right to counsel);[3] *Waley* v. *Johnston,* 316 U.S. 101 (1942) (threats by prosecutor to publish false statements). Indeed, in *Pennsylvania ex rel. Herman* v. *Claudy, supra,* Mr. Justice Black reviewed this Court's decisions as establishing that "... a conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause...." 350 U.S. at 118 (emphasis added).

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[3] *House* v. *Mayo,* 324 U.S. 42 (1945); *Tomkins* v. *Missouri,* 323 U.S. 485 (1945); *Williams* v. *Kaiser,* 323 U.S. 471 (1945); *Smith* v *O'Grady,* 312 U.S. 329 (1941); *Walter* v. *Johnston,* 312 U.S. 275 (1941).

It seems clear, therefore, that a valid constitutional claim is presented when a habeas corpus petition alleges that a guilty plea was involuntarily rendered because of the existence and threatened use of a coerced confession. At least five courts of appeal in addition to the Second Circuit have so held.[4] Moreover, such a claim is analogous to the cases where this Court has already held that a confession may be coerced by the existence of a prior coerced confession. *See Leyra* v. *Denno,* 347 U.S. 556, 561 (1954); *Reck* v. *Pate,* 367 U.S. 433, 444 (1961); *cf. Harrison* v. *United States,* 392 U.S. 219 (1968).

Indeed, even the State now appears to concede for the first time that "a habeas corpus petitioner who can show a continuation of coercive elements from the time of confession to the time of plea, has always been entitled to relief." *Brief for Petitioner* 28.

In light of the principles enunciated by this Court, the Rule in six Circuits, and even the suggestion in the petitioner's brief, the question thus becomes one of the proper procedure for the district court which receives such a habeas petition.

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[4] See *Kott* v. *Green,* 387 F.2d 136 (6th Cir. 1967); *United States ex rel. Collins* v. *Maroney,* 382 F.2d 547 (3d Cir. 1967) (*per curiam*); *Smith* v. *Wainwright,* 373 F.2d 506 (5th Cir. 1967); *Sessions* v. *Williams,* 372 F.2d 366 (9th Cir. 1966); *Shelton* v. *United States,* 292 F.2d 346 (7th Cir. 1961), *cert. denied,* 369 U.S. 877 (1962).

In certain other decisions in some of these circuits the courts have applied this general rule but denied relief to the prisoner because after full hearings in the State Courts or District Courts, the confessions or the plea were found to be voluntary. See, *e.g., Busby* v. *Holman,* 356 F.2d 75 (5th Cir. 1966); *Humphries* v. *Green,* 397 F.2d 67 (6th Cir. 1968); *United States ex rel. McCloud* v. *Rundle,* 402 F.2d 853 (3d Cir. 1968).

One answer, but an improper one, to this question is that of the district courts in the Second Circuit prior to that Circuit's decision in the instant cases. Those courts tended to search such a petition to determine if the prisoner was represented by counsel at the time of the plea. If he was, the petition was dismissed as in the case of Wilbert Ross, without requiring the State to respond, on the ground that a plea of guilty was a waiver of all prior nonjurisdictional defects. The district courts thereby ignored the fact that the prisoner was coerced into making confessions, was denied the right to consult with his attorney, and was not advised of his right to remain silent, and refused to consider the impact which such a coerced confession might have had on the voluntariness of the plea. That result, it is submitted, is contrary to good sense and to precedent. Such a result is particularly egregious when the only state procedure which was available to the prisoner at the time of his plea for testing the voluntariness of his confession—submission of the issue to the trial jury—was an unconstitutional one, *Jackson* v. *Denno,* 378 U.S. 368 (1964).[5]

The proper answer, as given by the Second Circuit in these cases, is to hold an evidentiary hearing to determine if the plea is voluntary or involuntary. Indeed, *Townsend* v. *Sain,* 372 U.S. 293 (1963), and the subsequently amended statutory scheme, 28 U.S.C. §2254(d)(1) (Supp. II, 1967), require such a hearing. In short, the applicant for federal

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[5] It is clear that *Jackson* v. *Denno* is to be applied retroactively. First, *Jackson* v. *Denno* itself was a federal habeas corpus case. Second, the cases dealing with whether other recent decisions of this Court should be applied retroactively have expressly recognized that *Jackson* v. *Denno* is to be so applied. *Johnson* v. *New Jersey,* 384 U.S. 719, 727-29 (1966); *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966); *Linkletter* v. *Walker,* 381 U.S. 618, 639 n. 20 (1965).

habeas corpus is entitled to his day in court on the issue of the voluntariness of his guilty plea.[6]

The need for an evidentiary hearing in this case is underscored by the nature of the test to be used to determine the voluntariness of the plea and of the confessions. The test of the voluntariness of a guilty plea was well put by Judge Weinfeld in *United States* v. *Colson,* 230 F.Supp. 953, 955 (S.D.N.Y. 1964) (footnotes omitted):

> "The determination of the ultimate question of whether the defendant, at the time he pled guilty, had the free will essential to a reasoned choice, rests upon probabilities and, of course, cannot be resolved with mathematical certainty. It involves an evaluation of psychological and other factors that may reasonably be calculated to influence the human mind. The issue of the defendant's state of mind 'is to be decided by the trier of the fact, whether court or jury, just as any other fact issue—the reasonable inferences to be drawn from all the surrounding facts and circumstances'. Accordingly, it is necessary to consider the plea of guilty against the totality of events and circumstances which preceded its entry."

Similar criteria are used to test the voluntariness of confessions obtained and used prior to the effective dates of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966).[7] The test requires the court to make a determination as to the ultimate issue of volun-

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[6] *Cf. Mempa* v. *Rhay,* 389 U.S. 128, 136 (1967) ("[T]he incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as de minimis").

[7] See *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

tariness upon the "totality of the circumstances," *Haynes* v. *Washington,* 373 U.S. 503, 514 (1963), and upon "the entire record," *Davis* v. *North Carolina,* 384 U.S. 737, 741 (1966). *See generally* Comment, *The Coerced Confession Cases in Search of a Rationale,* 31 *U. Chi. L. Rev.* 313 (1964). Thus, the very nature of the test of voluntariness requires an evidentiary hearing where, as here, the petition lays a detailed and specific factual basis for the contention that a guilty plea and confessions were coerced.

Finally, the inquiry into voluntariness may involve difficult factual and legal issues, but that cannot justify the refusal to make it:

> Admittedly there is a fine line between refusing on the one hand to set aside a plea of guilty where there was a possible coerced confession which did not effect the voluntariness of the plea and, on the other, possibly setting aside the plea if the confession caused the plea and thus rendered it involuntary. The line must be drawn, however, on the facts and after a hearing. And there must be a hearing when the allegations of the petition make out a possible fatal infection of the plea from the confession. *Carpenter* v. *Wainwright,* 372 F.2d 940, 942 (5th Cir. 1967).

In sum, we submit that the rule adopted by the court below is a sound one, bottomed, as it is, on the relevant decisions of this Court safeguarding against coerced confessions and involuntary pleas of guilt, and requiring evidentiary hearings where a prisoner alleges facts which if proven would entitle him to relief. It is the prevalent rule among the Circuits, and its administration does not seem to have hampered the judicial machinery in those

Circuits, which is understandable since in order to be granted a hearing, the petitioner must allege specific facts which demonstrate that the confession was coerced and the plea involuntary. Finally, and most importantly, a rule which, in determining whether a plea of guilty was involuntarily entered, takes into account the fact that law enforcement officials may have forced a confession from an accused is one which holds out the possibility of federal relief in situations of official illegality. It is not an invitation to a jail delivery.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit in the instant cases should be affirmed.

Respectfully submitted,

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